(3) *Public Prosecutor* v. *Hussin* [1960] M.L.J. 90.

(4) *Re Chan Eow Beng* [1961] M.L.J. 181.

(5) *R.* v. *Surrey Quarter Sessions; Ex parte Commissioner of Metropolitan Police* [1962] 2 W.L.R. 1203.

MAGISTRATE'S CRIMINAL APPEAL.

M. Mahalingam (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Chang Min Tat J. (delivering oral judgment): The accused was charged and convicted on an offence of permitting his car to be used by an unlicensed driver under section 138 (2) of the Road Traffic Ordinance and further of such user without a valid policy of insurance in respect of third party risks and was fined $20 on the first charge and $30 on the second charge and he was ordered to be disqualified from driving for 6 months only.

The first charge was framed under the wrong section. It occurs to me that I have spent a lot of my time in criminal appeals amending the charges of lower courts and I would therefore exhort the learned Deputy Public Prosecutor to ensure that his prosecuting officers would frame the correct charges and if they were in any doubt as to so doing to offer his assistance to such prosecuting officers. The charge for permitting another person to drive a motor-car without being the holder of a valid driving licence is an offence under section 25 (2) of the Road Traffic Ordinance and is punishable under section 146 of the Road Traffic Ordinance.

The charge as framed while technically incorrect did however specify the offence of permitting the user on the public road by an unlicensed driver and it is quite clear that in no instance was the respondent ever misled. I am therefore of the opinion that no miscarriage of justice had resulted and I therefore amend the charge to bring it under section 25 (2) and punishable under section 146.

For the disqualification of 6 months, the learned magistrate had not recorded in his grounds of judgment any special reasons or any reasons whatsoever why he should order a disqualification for a lesser period than the statutory minimum of 12 months. He was however aware of his duty because he clearly stated that he ordered disqualification for 6 months only. The circumstances of the offence were these. The respondent was teaching his wife who was not a holder of any licence, competent or provisional. In these circumstances there can be no special reasons which are relevant to the offence and not to the offender, as has been decided in a number of cases: *Public Prosecutor* v. *M. Karthiah,*[1] *Re Kanapathipillai & Ors.,*[2] *Public Prosecutor* v. *Hussin.*[3] In *Re Chan Eow Beng,*[4] it was held that it was immaterial if the effect of the disqualification was necessarily and consequently to deprive the defendant of his livelihood. Further in the case of *Regina* v. *Surrey Quarter Sessions; Ex parte Commissioner of Metropolitan Police,*[5] disqualification is held not to be a sentence.

The law in section 74(2) of the Road Traffic Ordinance clearly lays down a statutory minimum period of disqualification of 12 months and with powers to the trial magistrate to increase that period. However if there are special reasons he could consider them and in a proper case order reduction of the period to less than 12 months but he must state what the special reasons he found were. In this case it is obvious that the learned trial magistrate had some sympathy for the accused. With respect the sympathy is misplaced, and it is clearly the duty of the magistrate, as it is mine, to apply the law as enacted by the legislature.

The appeal is allowed, the period of disqualification of 6 months set aside and a period of 12 months substituted.

Appeal allowed.

BALAKRISHNAN v. DEPUTY PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Aziz J.) November 6, 1968]
[K.L. — Criminal Appeal No. 1 of 1968]

Bribery and Corruption — Onus of proof — Presumption — Burden of proof — Sentence — Special circumstances — Prevention of Corruption Act, 1961, ss. 4(a) & 14.

Criminal Law and Procedure — Sentence — Exceptional circumstances — Reduction.

This was an appeal against the conviction and sentence of the appellant under section 4(a) of the Prevention of Corruption Act, 1961. The prosecution in this case proved that the appellant received $5 from the complainant. The president of the sessions court convicted the appellant as he did not accept the appellant's story that the money had been planted on him.

Held, dismissing the appeal: (1) in a charge under the Prevention of Corruption Act, 1961 once the prosecution has proved that money has been given or received by an agent and employee of the Government the burden of proof shifts to the accused to rebut the presumption under section 14 of the Act that the money was obtained corruptly or as an inducement or reward for doing an act in relation to the principal's affairs. The burden is, however, not so great as that placed on the prosecution. All that the accused has to do is to show that his defence is probably true;

(2) in this case the learned president was correct in rejecting the defence of the appellant and the conviction must therefore be confirmed;

(3) in the exceptional circumstances of this case, as the charge had been hanging over the appellant's

head for the last two years, the sentence of five months imprisonment would be reduced to 1 day's imprisonment and a fine of $2,000 or in default six months imprisonment.

MAGISTRATE'S CRIMINAL APPEAL.

S. Seenivasagam for the appellant.

Abdullah bin Ghazali (Deputy Public Prosecutor) for the respondent.

Abdul Aziz J. (delivering oral judgment): This appeal is against conviction and sentence imposed by the learned President of the Sessions Court at Raub. Accused was convicted under section 4(a) of the Prevention of Corruption Act, 1961, and was sentenced to five months imprisonment. Against this conviction and sentence, the accused has now appealed.

Now, an offence under the Prevention of Corruption Act is quite different from any other criminal offences under the Penal Code. In other criminal offences, there are so many ingredients and so many material facts which must be proved beyond doubt. Under the Prevention of Corruption Act, the sole question is:—

"Did the agent corruptly accept or obtain money from any person as an inducement or reward for doing an act in relation to his principal's affairs?"

To prove this ingredient, all the prosecution is required to do is to prove that money had been given or received by an agent and employee of the Government. Once this is proved, the presumption under section 14 will arise. This is solely a question of fact. Once the presumption has been raised, the burden of proof shifts to the accused. The burden is, however, not so great as that placed on the prosecution. All that the accused has to do is to show that his defence is probably true.

As far as this case is concerned, the question is whether the $5 had been paid to the accused by P.W.3. Evidence shows that accused said 'duit lima ringgit' and P.W.3 handed him the $5 and the money was received by the accused. The policeman who was with P.W.3 also testified that the accused said 'duit lima ringgit' and he saw the accused taking some money. The investigating officer who searched the accused testified that he found the $5 marked notes in his possession. There are, of course, inconsistencies and discrepancies concerning the surrounding evidence, but as regards the material evidence there are none. Consequently, the learned president raised the presumption and rightly called upon the accused to make his defence. The accused denied having asked for $5. The money was found amongst his papers. He picked it up and put it in his pocket with the intention of handing it over to the district officer. Just then, the police inspector arrived and arrested him and searched him. In short, the accused's defence was that the money was probably planted on his table. Of course, if that is probably true, then the accused was entitled to be acquitted. The learned president, however, rejected the defence. He did not accept the accused's story because if P.W.3 had intended to plant money on the accused's table why did he plant only $5 when he had $10 which was given to him. Learned counsel at the appeal posed another question: "Why did the accused take only $5 when on the first occasion he had asked for $10?" I would not venture to suggest a reason. Perhaps the time lapse between the first occasion and the second occasion of roughly three months might have been the cause. There is no evidence to show that the accused had known P.W.3 before. It is, therefore, highly unlikely that anyone could remember exactly what he had asked two weeks before, let alone three months ago. One piece of material evidence was why did the accused say 'duit lima ringgit'. The evidence was given by P.W.3 and corroborated by the police. No explanation was given for this request. I have been looking through the defence evidence, but nowhere was there an explanation of this, apart from a flat denial.

I cannot see, therefore, from the defence that the learned president could come to any other conclusion. I therefore dismiss the appeal against conviction.

Regarding the sentence . . . . normally, I would not interfere with the sentence imposed by a lower court unless it is manifestly excessive. But I am going to do so in this case because this charge has been hanging over the accused's head for the last two years. He was convicted before a previous president and had appealed and his appeal was allowed. He was retried and again convicted and has again appealed. I know that corruption is a serious offence, but exceptional circumstances — as in this case — would mitigate the severity of the sentence imposed by law. I would, therefore, order that the sentence as imposed be quashed and substitute a sentence of 1 day's imprisonment plus $2,000 fine or in default six months imprisonment.

Appeal against conviction dismissed.

Sentence varied.

Solicitors: *S. Seenivasagam & Sons.*